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Supreme Court, U.S.
FILED
OCT 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

NO. 88-395

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN C. ELLINGSWORTH, Warden
Sussex Correctional Institution, and
CHARLES M. OBERLY, III, Attorney
General of the State of Delaware,

Petitioners,

v.

GEORGE L. REYNOLDS

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BEVERLY L. BOVE
COUNSEL OF RECORD

TOMAR, SELIGER, SIMONOFF, ADOURIAN
& O'BRIEN
Suite 1704, Mellon Bank Center
919 Market Street
Wilmington, Delaware 19801
(302) 655-0500

Dated: October 20, 1988

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SUMMARY OF ARGUMENT

The decision of the Third Circuit Court of Appeals is consistent with the body of law applying the "independent and adequate state ground" doctrine that bars federal habeas corpus review of claims procedurally defaulted. The decision below is merely an application of settled law to the facts of this case. There is no question of law at issue that justifies the grant of a writ of certiorari.

ARGUMENT

The legal principles which govern the decision here have been well established by this court. see Wainwright v. Sykes, 433 U.S. 72 (1977); Henry v. Mississippi, 379 U.S. 443 (1965).

Petitioner seeks to have this case reviewed to determine the exact parameters of federal habeas review of procedurally defaulted claims based on the "independent and adequate state ground" doctrine. In essence, the state argues that a federal habeas claimant whose counsel failed to raise an issue at trial and on direct appeal should be barred from habeas review without regard to the adequacy of the purported state procedural rule upon which such default was based.

Such a reading of Supreme Court precedent is inconsistent with the line of decisions handed down by this Court.[1]

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[1] The state fails to recognize the fact that Reynolds' alleged procedural default "does not legitimize the unconstitutional conduct by which his conviction was procured." Fay v. Noia, 372 U.S. 391, 428 (1963).

1. **The Court of Appeals Properly Decided The Adequacy Of Delaware's Procedural Default Rule Notwithstanding The Existence Of An Unresolved Question Of Exhaustion.**

The Third Circuit Court of Appeals in Reynolds' case held that Delaware did not have an "independent and adequate" procedural default rule sufficient to bar consideration on the merits of Reynolds' due process claim pertaining to prosecutorial misconduct.[2] After so ruling, the Court of Appeals noted that Reynolds may not have exhausted his state remedies on his other habeas claim, a Sixth Amendment violation of his right to effective assistance of counsel, and remanded the matter back to the district court to determine this issue. On the authority of Rose v. Lundy, 455 U.S. 509, 518-22 (1982), the Court of Appeals aptly noted Reynolds' entire habeas petition could be dismissed if the district court rules on remand that Reynolds' ineffective assistance claims were not exhausted.[3]

The state maintains that once the Court of Appeals concluded that Reynolds may not have exhausted state remedies and thus, possibly subjected the entire petition to dismissal, it was then obligated not to remark on the adequacy of Delaware's procedural rule citing Slayton v. Smith, 404 U.S. 53, 54 (1971) as authority for its position.

The State's reliance on Slayton is misplaced. The Slayton Court of Appeals, after concluding petitioner's habeas corpus claim had not been exhausted in the State courts, made certain unnecessary remarks as to the merits of the unexhausted claim. This Court

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[2] As a matter of federal law, federal courts, upon petition, are free to review alleged violations of constitutional rights occurring in state courts. 28 U.S.C. §2254. Only out of comity and federalism, and not of federal power, does a federal habeas court respect the decision of the state court. Wainwright v. Sykes, 433 U.S. 72, 81-83 (1977). In regards to state procedural rules constituting a bar to review on the merits in the state court, such state procedural rules will not be respected by the federal habeas court if they are not independent and adequate. Sykes, 433 U.S. at 82.

[3] The Court of Appeals also recognized that under Rose, Reynolds "may choose to 'proceed only with his exhausted claims and deliberately set[] aside his unexhausted claims...' 455 U.S. at 520-21." App. 28 n. 22.

admonished that, absent special circumstances, the Court of Appeals should avoid any implication on the merits of a claim that is not ripe for federal review. 404 U.S. at 54.

The Reynolds case presents a completely different legal scenario. The Third Circuit did not determine that Reynolds failed to exhaust his state remedies. In fact, the court found that Reynolds had exhausted state remedies regarding the due process claim that was barred from review in the state court by the inadequate state procedural rule. With regard to Reynolds other habeas claim, his Sixth Amendment ineffective assistance claim, the Court of Appeals made no determination on exhaustion, it simply remanded the matter to the District Court with a direction to determine if these claims had been sufficiently exhausted.[4] Furthermore, the Court of Appeals did not express a view on the "merits" of any claims, it simply indicated that because of the state's inadequate procedural bar, Reynolds could obtain review by the district court on the merits of his due process claim arising from improper prosecutorial remarks.

The state simply cannot and does not cite any High Court authority which would suggest that the Third Circuit's declaring Delaware's procedural default rule inadequate at the time of Reynolds' trial and remanding the matter on an issue of exhaustion was improper.

Finally, the State claims that state and federal judges will "struggle with the meaning and scope" of the Third Circuits' opinion and fear a floodgate of habeas petitions from the

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[4] The Court of Appeals, however, quite accurately noted:

> We recognize that, where the State has not raised nonexhaustion as a defense and where there are no "unresolved question[s] of fact or of state law [that] might have an important bearing" on the claims, Granberry v. Greer, _____ U.S. _____, 107 S. Ct. 1671, 1675 (1987), we can reach the merits of the unexhausted claims. However, we feel that a remand to the district court for determination of all unresolved issues, including exhaustion, is appropriate in this case.

App. 28 n. 23.

prison. A careful, reflective reading of the opinion exposes its underwhelming scope as precedent. The opinion merely identifies Delaware law as it existed at the time of Reynolds' purported waiver and concludes that this body of law did not provide for a default rule sufficient to bar merit review of his due process claim. Surely, our judiciary is capable of recognizing the limited impact of Reynolds and can analyze future habeas applications with reference to the later developed judicial precedent at the time of those purported waivers.

2. The Question of When a Federal Court Can Review a Habeas Petitioner's Federal Claims When the State Court has Declined Review on Procedural Default Grounds Has Been Settled By this Court and Does Not Warrant Review on Writ of Certiorari.

The State next makes a strained argument that certiorari should be granted because this Court has never examined the nature and scope of a federal habeas court's power to re-examine and overturn a state court's finding that a prisoner defaulted a claim. However, the state completely ignores the occasions where this High Court has examined the proper deference a federal habeas court must accord state decisions to decline review of claims based on an adequate state procedural ground.

The "adequate state ground" doctrine is not new to this Court. As a matter of comity and federalism, and not of federal power, this Court has long prohibited the federal courts from exercising habeas corpus power in cases where the state decision has rested on an independent and adequate state ground. Henry v. Mississippi, 379 U.S. 443, 446 (1965); Wainwright v. Sykes, 433 U.S. 72, 81 (1977).[5]

Specifically, this Court has held that a federal court may not review a habeas petitioner's federal claims when the state courts have declined to pass on the claims based upon an independent and

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[5] The state maintains that the Court of Appeals has overturned the State court's finding that a prisoner has procedurally defaulted a claim. To the contrary, the Court of Appeals merely declared that the state procedural bar, operating at the time of Reynolds' trial and direct appeal, was not an independent and adequate state ground that would prevent federal habeas corpus review.

adequate state procedural ground, absent a showing of cause and prejudice. Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

Like most general rules, there is an exception. This Court has repeatedly stressed that a state procedural rule is not entitled to respect as an adequate and independent state ground unless the procedural rule is "strictly or regularly followed." Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982); Barr v. City of Columbia, 378 U.S. 146, 149 (1964). This Court, in James v. Kentucky, 466 U.S. 341, 348 (1984), admonished that only state procedural rules that are "firmly established and regularly followed...can prevent implementation of federal constitutional rights."

Any inquiry into cause and prejudice under Sykes by this Court has always been prefaced with a look to the procedural rule constituting a bar in the state courts, Sykes, 433 U.S. 72, 87 (discussing Florida procedure); Murray v. Carrier, 477 U.S. 478, 482 (1986) (discussing Virginia Supreme Court Rule 5:21); Reed v. Ross, 468 U.S. 1, 7-8 & n.5 (1983) (discussing North Carolina procedure); Engle v. Isaac, 456 U.S. 107, 124-25 & nn. 26-27 (1982) (discussing Ohio Rule of Criminal Procedure 30); and "has consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." Henry v. Mississippi, 379 U.S. 443, 447 (1965).

With these decisions as precedent, the Third Circuit in Reynolds not only properly inquired into the adequacy of Delaware's procedural default rule in determining whether federal habeas review would be warranted, but also properly concluded that it was inadequate to bar substantive review. It is abundantly clear that this Court has considered on numerous occasions the deference a federal habeas court must accord a state decision in the procedural waiver context, and has fully outlined the parameters of this deference. Certiorari is improper. The law is well settled and was properly applied in the case at bar.

If we strip the gloss from the state's argument, we expose a

feeble attempt to conceal what the Third Circuit actually did in this case. The Court of Appeals simply correctly applied the three-prong analysis of Sykes.

Unfortunately for the State and unlike many other state inquiries, Delaware fell short on the first prong of the test. The State had no "independent and adequate" procedural default rule expressed in unmistakable terms at the time of Reynolds' trial. While the State complains that the Third Circuit invaded the province of the State Court to make its own state law determinations, the fair import of its actual request is that this High Court review the Court of Appeals decision to see if it correctly identified State law within its particular jurisdiction.

3. The Third Circuit Correctly Determined that Delaware's Procedural Default Rule was not an Independent and Adequate State Ground so as to Preclude Federal Habeas Review.

In the State's criticism of the Third Circuit's opinion, it incorrectly charges the Court of Appeals with "rejecting" Delaware's procedural default rule. The lower court simply held that the rule, as applied to Reynolds, could not serve as an independent and adequate state ground to justify barring federal habeas review on the merits of Reynolds' due process claim.[6] App. 24.

In its second assault on the Third Circuit, the state, again incorrectly, charges the court with "misreading" Delaware's decisional law when concluding that Reynolds claim should not be barred by the law as it stood at the time of Reynolds trial and appeal. Crediting no weight to the Sykes test at all, the state feels that Delaware's general desire to follow federal default procedure was sufficient notice to Reynolds in his state court trial regardless of existing state law. In unearthing Delaware law at that time, the Third Circuit concluded that the state law did not "unmistakeably"

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[6] Prosecutor at Reynolds' trial referred to an alleged confession during his opening statement but never introduced that confession into evidence. Defense counsel's failure to request and the court's failure to issue sua sponte a limiting instruction or declare a mistrial denied due process under the Delaware and United States Constitutions.

provide a raise it or waive it notice in Reynolds' situation, App. 19, and that the application of the procedural default rule was not consistently applied in the state, App. 23; both fatal under Sykes.

The Third Circuit painstakingly analyzed the Delaware procedural default rule at the time of Reynolds trial and post-trial proceedings applying the three prong Sykes test for adequacy. App. 10-24. In contrast to Florida's procedural default rule scrutinized in Sykes, the Third Circuit found Delaware's deficient. Florida's rule passed Sykes muster because (1) the Florida rule "in unmistakable terms and with specified exceptions required the motion to suppress be raised before trial," 433. U.S. at 85; (2) that "all of the Florida appellate courts refuse[d] to review petitioner's federal claim on the merits after his trial, "id.; and (3) that "their action in so doing [wa]s quite consistent with a line of Florida authorities interpreting the rule in question as requiring a contemporaneous objection." Id. at 85-86.

In the case sub judice, the fatal flaw in the first prong of the analysis is the lack of a clear statement that certain objections are waived if not raised at trial or on direct appeal. App. 13-19. Compounding the problem for the Third Circuit was the Delaware court's repeated application of the default rule to Reynolds' due process claim where it was previously only applied sporadically. App. 19-24.

The Court of Appeals in applying the Sykes analysis, found (1) that Delaware's purported procedural default rule as applied to Reynolds did not state in unmistakable terms that Reynolds' waived his due process claim by not raising it at trial or on direct appeal, App. 19; (2) that the Delaware court's repeated application of the default rule to Reynolds' due process claim throughout his post conviction process might preclude habeas review, App. 23, if it were not for the fact that (3) their action was inconsistent with Delaware authority applying procedural waivers. App. 19-23. Thus, the Court of Appeals correctly concluded that the relied upon rule did not constitute an independent and adequate state procedural ground barring review of the claim by the federal courts. App. 24.

In Reynolds, the purported procedural default rule operating as a bar in the state courts developed in the case of Conyers v. State, 422 A.2d 345 (Del. 1980) (per curiam). In Conyers, the Delaware Supreme Court applied the Sykes cause-prejudice test to a state post conviction hearing pursuant to Rule 35 of the Delaware Superior Court Rules of Criminal Procedure (Rule 35) based on a claim entirely different from Reynolds' claim.

The Court of Appeals, when analyzing Conyers, under the first Sykes factor, found that there was no precedent prior to Reynolds' post conviction appeal, that the later decided Conyers, would apply in the context of Reynolds case. App. 18-19. Therefore, Conyers, in and of itself, could not serve as an adequate procedural default rule to bar Reynolds' habeas consideration. App. 19.

Acknowledging the state's primary reliance on Conyers to bar habeas relief, the Third Circuit further analyzed the post conviction rule itself, Rule 35, and noted that it contained no prohibitive language (as compared to other state rules) that claims raised on post-conviction appeal for the first time would not be reviewed. App. 15. Finding no other Delaware court rules on point, the Circuit Court concluded that there were no procedural default rules governing Reynolds' claim. App. 19.

The Court of Appeals then turned to the consistency analysis of Sykes. Upon a complete examination of Delaware decisional law, it concluded that procedural bars had been applied inconsistently to Rule 35 claims prior to Conyers. App. 19-21.

The Circuit Court further refined its analysis by canvassing Delaware claims first raised on direct appeal, specifically monitoring the consistency with which default rules were applied. This search revealed that Delaware routinely considers claims raised for the first time on direct appeal. App. 22. Given the leniency with which Delaware has applied its waiver rule, not only on post-conviction claims but also on direct appeal, the Circuit had no choice but to determine that, the application of the Conyers rule to Reynolds' case was not consistent. App. 23.

The State next complains that the appeals court "misread"

Delaware law. To support this claim, it argues that since 1960 Delaware has exhibited a longstanding desire to follow federal procedural requirements. Notwithstanding this argument, the state fails not only to reconcile the inconsistent application of state procedural defaults but also to cite any procedural rule that was applicable to Reynolds at the time of his alleged waiver.

Finally, in what appears to be a tacit concession that the Third Circuit's analysis of Delaware procedural default law is correct, it proffers an argument not raised or briefed below. The State argues that perhaps King v. State, 239 A.2d 707, 708 (Del. 1968) and State v. Herhal, 307 A.2d 553, 555 (Del. Super. 1973) create a procedural default rule applicable to Reynolds.[7] It proposes that King and Herhal stand for the proposition that if counsel made a tactical choice not to object at trial or present the issue on appeal, the claim was deemed waived. Assuming arguendo and notwithstanding the fact that in both cases the court reached the merits of the so called defaulted claims, both King and Herhal do not apply to Reynolds for the following reasons.

In Herhal, the defendant failed to object to a search by motion to suppress prior to trial. Before reaching the merits, the court held that such a failure could preclude review of the constitutionality of the search. Reynolds' claim, by contrast, condemns prosecutorial misconduct arising from extensive references in the prosecutor's opening statement to two purported confessions which were later withdrawn by the State from offer during a voluntariness hearing. Nothing in the language of Herhal suggests that its purported waiver penalty would operate outside the context of its limited suppression application.

King is equally distinguishable from Reynolds on two scores. King involved a waiver by the defendant of an evidence issue unlike Reynolds' due process claim of prosecutorial overreaching. Secondly,

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[7] It must be stressed that the State and the Delaware Courts, at the time of Reynolds' post conviction appeal, maintained that Reynolds claims were procedurally barred only by the holding of Conyers v. State, 422 A.2d 345 (Del. 1980) (per curiam).

King, through defense counsel, made an affirmative waiver at trial, on the record. Reynolds and his counsel were silent. They waived nothing. In distinguishing language that clearly could apply to Reynolds' case, the King court refused to decide the burden of proof the on voluntariness issue by saying, "[t]he instant case is not a case of silence and failure to object; this is, rather, a case of an affirmative waiver." King, 239 A.2d at 708. No such record waiver exists in Reynolds. Neither King or Herhal apply to Reynolds due process violation, nor do they operate to bar federal habeas review.

The State would have this Honorable Court believe that the Third Circuit again erred in its survey of Delaware law on the consistency issue. All of the case law cited by the State attempting to show the consistency, developed after Reynolds' trial and post-conviction proceedings and could not have been of any guidance to Reynolds. The Second and Fifth circuits have clearly held that "federal courts should generally determine questions of procedural default according to the habeas waiver law in effect at the time of the asserted waiver and that retroactive effect should not be given to such statutes." Spencer v. Kemp, 781 F.2d 1458, 1469 (11th Cir. 1986) (en banc) [citations omitted]; accord Lumpkin v. Ricketts, 551 F.2d 680, 682 & n.2 (5th Cir.), cert. denied, 434 U.S. 957 (1977). The Third Circuit, citing Spencer and Lumpkin, similarly rejected this argument, App. 22., cautioning that:

> Even if we were to conclude that a new Delaware procedural rule was created by Conyers, we could not also conclude that the rule barred collateral federal review, where it was applied to claims other than Rule 41(e) claims for the first time in the instant case.

App. 23.

The notion behind prohibiting retroactive application of waiver rules is consistent with this Court's decision in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). There, this Court held that a state procedural bar would not be considered independent and adequate where the criminal defendant

> could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be

> permitted to thwart [federal] review...applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

Id. at 457-58; accord James v. Kentucky, 466 U.S. 341, 348-49 (1984); Barr v. City of Columbia, 378 U.S. 146, 149 (1964); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 301 (1964); Wright v. Georgia, 373 U.S. 284, 290-91 (1963).

It was entirely proper for the Third Circuit to rest its decision with regard to the consistency aspect of Sykes on the Delaware case law that existed prior to the time of Reynolds' alleged waiver. Decisional law developed after Reynolds' trial is irrelevant to an analysis of the claims in the case at bar.

4. A Finding That the Defendant Deliberately By-passed a Procedural Rule for Strategic and/or Tactical Reasons Does Not Obviate the Need to Inquire into Whether that Rule is Independent and Adequate.

While the State accuses the Third Circuit of disregarding principles of law, it picks and chooses isolated principles and dicta from twenty-five years of case law and attempts to apply them in a piece-meal fashion to attack the Third Circuits analysis under Sykes. The result deliberately ignores both the effect of later decisions on previous general precedent and the ultimate refining by this Court of a habeas analysis.

Under the guise of Fay v. Noia, 372 U.S. 391 (1963) and Henry v. Mississippi, 379 U.S. 443 (1964) the state posits the notion that, notwithstanding the adequacy of a state's procedural bar, a defendant's conduct in foregoing an opportunity to present an issue for tactical reasons is a sufficient basis for denying federal habeas review. The state actually forms a substitute test for the adequacy analysis of Sykes by arguing that the validity of the State forfeiture is irrelevant if the defendant or his counsel exercised a tactical decision not to raise a claim. A waiver presupposes the existence of a clear message that the claim is defaulted if not raised. The determination must first be made that a claim is defaulted if it is not raised. There must be clear notice of the procedural bar before any analysis of the motivations behind the

failure to raise the claim can be undertaken. The lessons of Sykes and its progeny bear this out.

Although the state ardently fights the Third Circuit's application of the three-prong Sykes test, Sykes clearly requires that analysis before habeas relief is denied in the federal court. Prior to reaching the cause and prejudice analysis[8], Sykes requires an inquiry into the adequacy of the state procedural default rule that would result in the barring of federal review. Sykes, 433 U.S. at 81-86. This Court in Sykes made no inquiry into counsel's motivations behind not raising a claim when scrutinizing the "adequacy" of Florida's procedural rule. Instead, Sykes left this consideration to the cause aspect of its newly enunciated "cause-prejudice" test. 433 U.S. at 91, and n.14. When formulating the "cause-prejudice" test, the Sykes' court concern of preventing defense counsel from flouting state procedures was well-addressed under the later "cause" prong of Sykes and not under its initial "adequacy" analysis. 433 U.S. at 90. Obviously and logically, the Court had to determine the existence of a contemporaneous objection rule consistent with the United States Constitution before it could address any issue of waiver. The State has had to put the cart before the horse in its convoluted attempt to convince this Court to review the Third Circuit's decision.

The above reading of the Sykes analysis and the Third Circuit's application to Reynolds is further bolstered by the court's decision in Reed v. Ross, 468 U.S. 1 (1984). In Reed, as in Sykes, the Court addressed its entire discussion of tactical procedural defaults under the "cause" prong of the Sykes "cause-prejudice" test. 468 U.S. at 13. As Reed noted, the reasoning behind the Court's "cause" inquiry is the notion of binding a defendant to the tactical

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[8] In Sykes, the Supreme Court dropped the "deliberate by-pass" test of Fay v. Noia, 372 U.S. 391 (1963) in favor of the "cause-prejudice" test. Under the "deliberate by-pass" test, a federal court could refuse to review a defaulted claim where the applicant had deliberately by-passed the orderly procedure of the state courts. Under the Sykes "cause-prejudice" test, a defendant must show "cause" for the non-compliance with the procedural rule and make "some showing of actual prejudice resulting from the alleged constitutional violation," Id. at 84, before a federal court will overlook a waiver of claims in the state court.

decisions of counsel[9] Id. This Court also clarified in Reed that defense counsel's motivations relating to a failure to raise a claim are properly reviewable under the "cause" aspect of Sykes.

As both Sykes and Reed indicate, concerns about binding a defendant to the tactical decision of counsel, concerns expressed in Fay, 372 U.S. at 428-439, and Henry, 379 U.S. at 451,[10] do not get addressed or considered unless and until there is found a procedural rule that penalizes these tactical decisions with a well defined waiver of the claims that were not raised.

While the State maintains that the Third Circuits opinion "stands in stark contrast" to this Court's analysis of similar situations, it is imminently clear that the Third Circuit's analysis is accurate under the continuum of decisions preceding Sykes and later decided cases. Only after the reviewing court has resolved in the affirmative the question of whether the purported procedural bar is independent and adequate, is it free to scrutinize counsel's motivation for failing to raise a claim. If such motivation was tactical, then "cause" under Sykes cannot be found. 468 U.S. at 14.

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[9] The State's tortured logic behind binding a defendant to a tactical "waiver" when the very existence of a clear procedural default rule defining the waiver is suspect, defies credulity.

10 The State, when torturing out of Fay and Henry a proposed new test for determining when a federal habeas claim can be reviewed, failed to point out that Fay, 372 U.S. at 439, required the defendant to make a prior approval after consultation of counsel's strategy and tactics before such strategy would preclude the accused from asserting constitutional claims. Henry, 379 U.S. at 451, required this consultation in exceptional circumstances before defendant could be bound to counsel's strategy. Reynolds received no such consultation regarding any of the "tactics" which resulted in waiver.

CONCLUSION

For the foregoing reasons this Court should deny this petition for writ of certiorari.

Respectfully submitted,

BEVERLY L. BOVE
COUNSEL OF RECORD

TOMAR, SELIGER, SIMONOFF, ADOURIAN
& O'BRIEN
Suite 1704, Mellon Bank Center
919 Market Street
Wilmington, DE 19801
(302) 655-0500

Dated: October 20, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5633

GEORGE L. REYNOLDS,
Appellant

v.

JACK C. ELLINGSWORTH, WARDEN and
CHARLES M. OBERLY, III

On Appeal from the United States
District Court for the
District of Delaware
(D.C. Civil Action No. 86-0412 [§ 2254])

Argued November 30, 1987

Before: WEIS, HIGGINBOTHAM and
MANSMANN, *Circuit Judges*.

(Filed March 31, 1988)

BEVERLY L. BOVE, ESQ. (ARGUED)
Tomar, Seliger, Simonoff, Adourian & O'Brien
Suite 1704, The Mellon Bank Center
919 Market Street
P.O. Box 955
Wilmington, DE 19801

Attorney for Appellant